STATE OF MICHIGAN

IN THE SUPREME COURT

SCOTT M. CAIN,

Plaintiff-Appellee,

v

WASTE MANAGEMENT, INC. and TRANSPORTATION INSURANCE COMPANY,

Defendant-Appellant,

and

SECOND INJURY FUND (TOTAL AND PERMANENT DISABILITY PROVISIONS),

Defendant-Appellant.
_____/

Docket No. 125180
(Consolidated with No. 125111)

Court of Appeals No. 242123
(Consolidated with No. 242104)

Lower Court No. WCAC 98-0390

ORAL ARGUMENT REQUESTED

PLAINTIFF-APPELLEE SCOTT CAIN'S BRIEF IN OPPOSITION TO APPEAL OF DEFENDANT-APPELLANT SECOND INJURY FUND (TOTAL AND PERMANENT DISABILITY PROVISIONS)

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COUNTER-STATEMENT OF QUESTION PRESENTED

WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT THE "LOSS OF INDUSTRIAL USE" STANDARD MAY BE APPLIED TO CLAIMS OF SPECIFIC LOSS UNDER MCL § 418.361(2) AND ALSO THAT CORRECTIVE DEVICES MAY NOT BE CONSIDERED UNDER SUCH CLAIMS?

Defendant-Appellant Waste Management says "no".

Defendant-Appellant Second Injury Fund says "no".

Plaintiff-Appellee Scott Cain says "yes".

The WCAC says "yes".

The Court of Appeals says "yes".

WHETHER PIPE V LEESE TOOL & DIE SHOULD BE UPHELD?

Defendant-Appellant Waste Management says "no".

Defendant-Appellant Second Injury Fund says "no".

Plaintiff-Appellee Scott Cain says "yes".

The WCAC did not answer this question.

The Court of Appeals upheld Pipe but did not answer this question.

DID THE COURT OF APPEALS PROPERLY REJECT ANY CLAIM THAT THE WCAC VIOLATED THE TERMS OF THE SUPREME COURT'S REMAND OR EXCEED CAIN'S ORIGINAL REQUEST FOR BENEFITS BY GRANTING CAIN T & P BENEFITS WHERE CAIN'S ORIGINAL APPLICATION FOR BENEFITS SOUGHT T & P BENEFITS FOR INJURIES TO HIS LEGS AND WHERE THE WCAC DETERMINED ON REMAND THAT CAIN SUSTAINED THE LOSS OF EACH OF HIS LEGS NECESSARY TO ESTABLISH ELIGIBILITY FOR T & P BENEFITS?

Defendant-Appellant Waste Management says "no".

Defendant-Appellant Second Injury Fund says "no".

Plaintiff-Appellee Scott Cain says "yes".

The WCAC awarded t & P benefits but did not specifically answer this question.

The Court of Appeals says "yes".

WHETHER THIS COURT SHOULD REVERSE ITS PRIOR HOLDING THAT WAGE EARNING CAPACITY AND CORRECTIVE DEVICES MAY BE CONSIDERED IN T & P CLAIMS FOR THE LOSS OF INDUSTRIAL USE OF TWO MEMBERS?

Defendant-Appellant Waste Management says "no".

Defendant-Appellant Second Injury Fund says "no".

Plaintiff-Appellee Scott Cain says "yes".

The WCAC did not answer this question because it awarded benefits under a different provision.

The Court of Appeals did not answer this question.

COUNTER STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. NATURE OF ACTION.

This action is the most recent appeal in a long appellate history of an administrative application filed in 1992 by Scott Cain in which he requested benefits under the Workers' Disability Compensation Act.

II. CHARACTER OF PLEADINGS AND PROCEEDINGS.

Defendant-Appellant Second Injury Fund (Total and Permanent Disability Provisions) appeals the decision of the Court of Appeals Cain v. Waste Management, Inc. and Second Injury Fund (Total and Permanent Disability Provisions), dated November 6, 2003. (Included in Appendix of Waste Management at p.62a). This decision upheld the decision of Worker's Compensation Appellate Commission ("WCAC") mailed May 24, 2002, Cain v Waste Management, Inc. and Second Injury Fund (Total and Permanent Disability Provisions), 2002 ACO #130. (Included in Appendix of Waste Management at p. 27a). The WCAC issued its opinion on remand from the Michigan Supreme Court in Cain v Waste Management, 465 Mich 509 (2002).

The underlying facts as stated by the Supreme Court are:

> "Plaintiff Scott M. Cain worked as a truck driver and trash collector for defendant, Waste Management, Inc. In October 1922, as he was standing behind his vehicle emptying a rubbish container, he was struck by an automobile that crashed into the back of the truck. Mr. Cain's legs were crushed. Physicians amputated Mr. Cain's right leg above the knee. His left leg was saved with extensive surgery and bracing.
>
> "In February 1990, Mr. Cain was fitted with a right leg prosthesis, and he was able to begin walking. He returned to his employment at Waste Management and started performing clerical duties.
>
> "Mr. Cain's left leg continued to deteriorate. In October 1990, he suffered a distal tibia fracture. Doctors diagnosed it as a stress fracture caused by

> preexisting weakness form the injury sustained in the accident. After extensive physical therapy and further surgery on his left knee, Mr. Cain was able to return to Waste Management in August 1991, first working as a dispatcher and then in the sales department.
>
> "Waste Management voluntarily paid Mr. Cain 215 weeks of worker's compensation benefits for the specific loss of his right leg. MCL 418.361(2)(k). However, there was disagreement concerning whether he was entitled to additional benefits." Cain v Waste Management, Inc, 465 Mich 509, 513; 638 NW2d 98 (2002).

The Supreme Court also recounted the procedural history of the case, summarized as follows:

Plaintiff filed a petition with the Bureau of Worker's Disability Compensation seeking total and permanent disability benefits for the injuries to his legs. Cain, *supra* at 514. At the hearing on that claim plaintiff moved to amend his petition to expressly include a claim for specific loss of his left leg, a motion that was denied. Id. Plaintiff then filed a separate petition requesting benefits for the specific loss of the left leg. Id.

The trial Magistrate awarded plaintiff specific loss benefits for both of his legs to be paid consecutively. Id. The Magistrate reasoned that, although he had denied plaintiff's motion to add a claim for specific loss of the left leg, plaintiff's original claim for "loss of industrial use of both legs implicitly included a claim for specific loss of the left leg." Id.

After finding the specific loss of both legs, the Magistrate also found that plaintiff had lost the industrial use of both legs and, therefore, the "Fund would be obligated to pay benefits for total and permanent disability". Id. at 515.

The Second Injury Fund (Total and Permanent Disability Provisions) and Defendant Waste Management and Transportation Insurance Company appealed to the Workers' Compensation Appellate Commission. The Commission held that the Magistrate erred in

awarding benefits for the specific loss of the left leg in light of the phrasing of plaintiff's initial petition to the Bureau. The Commission also held that the Magistrate legally erred in his analysis of the total and permanent disability claim. Id. On this point, the Commission held that in determining whether plaintiff was totally and permanently disabled the Magistrate was to use a "corrected" standard to examine the remaining usefulness of plaintiff's "*braced* leg", rather than evaluating the usefulness of the leg without the brace. Id.

Plaintiff appealed to the Court of Appeals and leave was granted. First, the Court of Appeals affirmed the Commission's denial of specific loss benefits for the left leg on the basis that plaintiff had not stated a claim for such benefits. Cain, 465 Mich at 515.

Second, the Court of Appeals reversed and vacated with respect to the finding of total and permanent disability benefits. Id. at 515-516. The Court of Appeals reasoned that an "uncorrected"test is the proper criterion for resolving the total and permanent disability question whether plaintiff lost the industrial use of his legs. Id. at 516. The Court of Appeals remanded with instructions that the Commission apply the uncorrected test and make the requisite factual determination. Id.

Not awaiting the remand, the Second Injury Fund and Defendant Waste Management applied to the Supreme Court for leave to appeal, which was granted and produced the Supreme Court's opinion referred to above. The Supreme Court reversed in part the Court of Appeals' judgment.

The Supreme Court held that a corrected test is to be used to determine total and permanent disability whereas an uncorrected test is only proper for determining specific loss. Id. at 518, 522-524. However, the Supreme Court was careful to limit its holding on

the corrected test to claims for total and permanent disability under MCL §418.361(3), subsection (g) (loss of industrial use of two members). Cain, 465 Mich at 512, 517, 519, 524 including fn 2, 10, 13.

The Supreme Court in a footnote added with respect to plaintiff's specific loss of the left leg claim that, "[w]hile this claim may not have been pleaded as specifically as it should have been, we discern no prejudice or surprise. Accordingly, we remand this claim to the WCAC for resolution." Id. at 510 n 1.[1] The Supreme Court concluded its opinion saying: "We remand to the WCAC to consider plaintiff's specific loss claim." Id. at 524.

On remand, the Commission decided that Cain had sustained the specific loss of his left leg. The Commission also held that: "Having shown specific loss of each leg, plaintiff is entitled to total and permanent disability benefits." (WCAC Opinion dated 5-24-02, p 7, Appendix of Waste Management, p 33a)."

Both the Second Injury Fund and Defendant Waste Management applied to the Court of Appeals for leave to appeal, and on September 6, 2002, the Court granted both applications. The Court of Appeals held that a specific loss can be shown using a "loss of industrial use" standard. (Court of Appeals decision dated 11-6-03, p 2, 7, Appendix of Waste Management, pp 63a, 68a). The court reasoned that Pipe v Leese Tool & Die Co., 410 Mich 510 (1981) is still good law, and upholds "loss of industrial use" as a test for specific losses. (Id.). The Court of Appeals noted that this Court reiterated that specific losses must be determined with the injured member in an uncorrected condition. (Id., p

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[1] There were also additional issues upon which leave was granted, but the Supreme Court "vacated the order granting leave to appeal regarding all other issues" then these. Cain, supra, at 510-511 n 1.

68a). Further, the Court of Appeals held the WCAC did not exceed the scope of remand by awarding Cain T & P benefits once it found he had sustained a second qualifying loss under the statute. (Id. p 68a-69a). The Supreme Court's remand did not preclude the WCAC from stating the legal consequences of its decision on Cain's second injury, Cain originally requested T & P benefits in his initial petition, Cain was not required to specifically plead the specific subsection of the T & P provisions which was the basis for his T & P claim, and the Court of Appeals could determine no surprise to the Second Injury Fund. (Id.).

Defendants Second Injury Fund and Waste Management requested leave to appeal from this Court. This Court granted leave in both cases. Plaintiff Scott Cain now responds to the appeal of Defendant Second Injury Fund (Total and Permanent Disability Provisions).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE "LOSS OF INDUSTRIAL USE" STANDARD MAY BE APPLIED TO CLAIMS OF SPECIFIC LOSS UNDER MCL § 418.361(2), FURTHER, PIPE SHOULD NOT BE OVERRULED.

Under the Workers Disability Compensation Act, the courts may review questions of law under a de novo standard of review. MCL § 418.861a(14); DiBenedetto v West Shore Hospital, 461 Mich 394, 401 (2000). At the outset, Plaintiff-Appellee Scott Cain notes that this Court's prior decision created internal inconsistencies in the interpretation of the Workers Disability Compensation Act (the "Act"). In fact, all the parties agree the result is unworkable. The implications of this Court's prior decision reach beyond the immediate subsections of the Act this Court discussed and considered. It is crucial that in this second opportunity, a workable decision results, and this will require careful consideration of the context and implications of any decision.

This appeal arose in part because on remand from this Court the WCAC held that Cain had sustained the specific loss of his remaining leg because it is industrially useless without a brace. Neither Defendant Waste Management nor Defendant Second Injury Fund appeal the conclusion that Cain has lost the industrial use of his remaining leg when it is evaluated without the benefit of braces or prosthetics.

Both Defendant-Appellant Waste Management and Defendant Second Injury Fund argue the WCAC used the wrong legal test and that the Court of Appeals repeated the error when it upheld the WCAC. Defendant-Appellant Waste Management claims that specific loss can only be shown by physical loss or amputation or its equivalent, and not by loss of industrial use. However, Defendant-Appellant Second Injury Fund goes further, claiming

specific loss can only be shown by amputation.

Second Injury Fund makes these arguments by two methods, the same employed by Waste Management. First, it assumes its own conclusion that the "plain language" of the statute supports its argument. Second, it urges the reversal of decades of precedent in several areas of the Act in order to make this Court's prior decision workable. Both arguments must fail.

A The Act Does Not Define the Statutory Term "Loss".

MCL § 418.361 of the Worker's Disability Compensation Act is the first statutory section disputed here. This section is often referred to as the scheduled loss section because it sets forth a schedule of benefits to be received for certain enumerated losses.

For example, MCL § 418.361(2) allows workers to collect benefits for the loss of a single body member, such as a hand or foot (also called "specific" losses). Under MCL § 418.361(3), if a worker has suffered the loss of two members, as set forth in a schedule in the statute, the worker is conclusively presumed to be totally and permanently disabled for 800 weeks and collects benefits for total and permanent disability ("T & P" benefits) during this time. The two losses don't have to occur at the same time. See, MCL § 418.521(1). Therefore, using the example of legs, a worker can be eligible for T & P disability benefits by adding together claims for two single losses or by a single claim for the loss of industrial use of both legs.

However, the term "loss" in MCL §418.361(2) is not defined in the statute. Rench v Kalamazoo Stove & Furnace Co., 286 Mich 314, 318 (1938). MCL §418.361(2) states:

> "(2) In cases included in the following schedule, the disability in each case shall be considered to continue for the period

specified, and the compensation paid for the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act for the loss of the following:

. . . . (a) Thumb, 65 weeks.
. . . . (b) First finger, 38 weeks.
. . . . (c) Second finger, 33 weeks.
. . . . (d) Third finger, 22 weeks.
. . . . (e) Fourth finger, 16 weeks.

The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of ½ of that thumb or finger, and compensation shall be ½ of the amount above specified.

The loss of more than 1 phalange shall be considered as the loss of the entire finger or thumb. The amount received for more than 1 finger shall not exceed the amount provided in this schedule for the loss of a hand.

. . . . (f) Great toe, 33 weeks.
. . . . (g) A toe other than the great toe, 11 weeks.

The loss of the first phalange of any toe shall be considered to be equal to the loss of ½ of that toe, and compensation shall be ½ of the amount above specified.

The loss of more than 1 phalange shall be considered as the loss of the entire toe.

. . . . (h) Hand, 215 weeks.
. . . . (I) Arm, 269 weeks.

An amputation between the elbow and wrist is 6 or more inches below the elbow shall be considered a hand, and an amputation above that point shall be considered an arm.

. . . . (j) Foot, 162 weeks.
. . . . (k) leg, 215 weeks.

An amputation between the knee and foot 7 or more inches below the tibial table (plateau) shall be considered a foot, and an amputation above that point shall be considered a leg.

. . . . (l) Eye, 162 weeks.

Eighty percent loss of vision of 1 eye shall constitute the total loss of that eye."

B Standard Definitions of the Term "Loss" Do Not Support Defendant Second Injury Fund's Position.

Merriam Webster's Collegiate Dictionary, 10th Edition, defines "loss":

"1: DESTRUCTION, RUIN".

Similarly, "lost" is defined:

"1: not made use of, won, or claimed" (Id.).

Black's Law Dictionary, Fifth Edition, offers this guidance using its approach of distilling case law from around the country:

"Loss is a generic and relative term. It signifies the act of losing or the thing lost; it is not a word of limited, hard and fast meaning and has been held synonymous with, or equivalent to, "damage", "damages", "deprivation", "detriment", "injury", and "privation"." (citations omitted).

Black's then breaks down the use of the word in various areas of the law:

"*Disability Benefits.* State workers' compensation laws, social security, and disability insurance contracts provide disability benefits for ***partial or permanent loss of use of limbs, eyes, etc.***

Insurance.

* * * *

> "Loss of eye" means ***loss of use*** for any practical purpose .....***Loss of member or loss of an entire member means destruction of usefulness*** of member or entire member for purposes to which in its normal condition it is susceptible of application, in absence of more specific definition. ***Loss of use of hand means substantial and material impairment of use*** in practical performance of its function. ***Loss of use of member is equivalent to loss of member***. ....." (Id., emphasis added, citations omitted).

Accordingly, loss of use is a well-recognized, accepted definition of "loss". This is especially true when viewed in the comparable contexts of disability benefits and insurance. While Second Injury Fund assumes the term "loss" can only mean amputation, standard dictionary definitions do not support this restrictive definition of "loss". Defendant-Appellant Waste Management goes almost this far and urges the "plain meaning" can only be amputation or loss tantamount to amputation. Both Defendants are assuming their own conclusions to further their arguments.

C The Judicial History of MCL § 418.361(2) Shows That Defining "Loss" to Include "Loss of Industrial Use" is Consistent With the Common Meaning of the Word "Loss", Is Consistent With the Practice of Other Jurisdictions With Similar Statutes, and is Consistent With the Purposes of the Act.

The courts may interpret ambiguous terms in statutes. Paschke v Retool Industries, 445 Mich 502 (1994). The Worker's Disability Compensation Act is remedial legislation that should be interpreted liberally in a humanitarian manner in favor of the injured employee. Wilmers v Gateway *(on rem)*, 227Mich App 339, 345 (1998) *lv denied*, 457 Mich 884, *rec denied*, 584 NW2d 921. (citations omitted). Literal constructions that produce unreasonable or unjust results that are inconsistent with the purpose of the act should be avoided. Id. (citations omitted). Second Injury Fund attempts to avoid rules of statutory construction by citing, *inter alia*, Rakestraw v General Dynamics Land Systems, 469 Mich 220 (2003).

However, Rakestraw states that courts may not avoid the plain language of statutes by waiving the phrase "liberal interpretation". The court went on to interpret the disputed provision in Rakestraw, using rules of statutory construction. Here, however, Second Injury Fund is too often content to simply assume its conclusion, that the word "loss" can only mean amputation. However, the statutory construction of the term "loss" performed by many Michigan Supreme Courts over the years have found just the opposite.

A few early decisions by this Court held that specific loss benefits under the predecessor of MCL §418.361(2) would only be awarded upon the actual, total physical loss of the specified body member. Packer v Olds Motor Works, 195 Mich 497 (1917); Adomities v Royal Furniture Co., 196 Mich 498 (1917); Wilcox v Clarage Foundry & Manufacturing Co., 199 Mich 79 (1917).

Almost immediately after these first few decisions the Michigan Supreme Court interpreted "loss" to include substantial physical destruction less than amputation, where the primary service of the member was lost. Lovalo v Michigan Stamping Co., 202 Mich 85 (1918); West v Postum Co., Inc., 260 Mich 545 (1932). Similarly, this Court also held loss of industrial use with no amputation sufficient to find "loss" of a hand. Shumate v American Stamping Co., 357 Mich 689 (1959) (1953 injury date).

Defendant Second Injury Fund discusses Palazzolo v Bradley, 355 Mich 284 (1959), which upheld the application of "loss of industrial use" standard in specific loss claims. The Michigan Supreme Court noted this approach was consistent with the interpretations of the courts of New York and Illinois, which have worker disability compensation statutes similar to Michigan's. Id. at 289. The Court noted it had previously adopted this approach in Reno v Holmes, 238 Mich 572 (1927), and expressly overruled any decisions that reached a

contrary result. Id. at 291. The Court finally noted that the contrary approach (i.e. requiring amputation) was at odds with the common meaning of the language used by the Act and with the beneficent purposes of the Act. Id.

Pipe v Leese Tool & Die, 410 Mich 510 (1981) has been the last word on this subject for 23 years. In Pipe, the Michigan Supreme Court held that courts who interpret the standard for specific loss benefits as requiring only anatomic loss or its equivalent are wrong. Id. at 526. The court specifically stated that specific loss can also be shown by loss of industrial use, as demonstrated by loss of the primary service of the injured body member in industry. Id. at 527. The Pipe court continued that the test it upheld was consistent with a long line of cases and not a new result. Id. at 519-527. Further, the court noted that its holding was consistent with "the test most universally applied in the other jurisdictions of this country". Id. at 527, citations omitted.

D The Michigan Supreme Court Rejected Second Injury Fund's Argument That Language Added to the Act Clarifying Where An Amputation Has to Occur to Qualify for Benefits Shows That "Loss" Can Only Mean Amputation.

As mentioned above, the Court in Rench, 286 Mich 314, noted the term "loss" was not defined in the Act, even *after* the Legislature clarified a problematic issue for the courts in 1927 by adding the specific measurements (contained in the current version of the statute cited above) determining where an amputation creates a loss of a lesser body part (e.g., hand or foot) versus the greater (e.g. arm or leg). See, 1927 PA 63. Thus the addition was an illustration, and not a limitation, on the definition of the term "loss". See, Rench, at 318.

Second Injury Fund argues that the addition of this language clarified that only amputation was a qualifying 'loss" under the statute. It is true that in the dissent of Palazzolo, 355 Mich 284, Justice Dethmers wrote that he believed the addition of the

explanatory language on amputations showed an intent to rid the statute of "loss of industrial use", but cited no authority for his view. However, in Mitchell v Metal Assemblies, Inc., 379 Mich 368, 375 fn 3, 376, (1967), this Court reiterated that loss of industrial use is a valid test for specific loss. Of note is that Justice Dethmers joined in the unanimous decision of this Court in Mitchell. This Court specifically re-approved Palazzolo, stating:

> "Proof of outright loss of a hand is one thing. Proof of a loss of the industrial use of that hand is something else. Proof of either entitles the appeal board to award compensation for loss of industrial use of the hand." Mitchell, at 378.

Thus Reno, Rench, Palazzolo, Mitchell, and Pipe demonstrate that the courts have carefully interpreted the undefined term "loss", including looking at the context of the common usage of the term, the practices of other states with similar statutes, and the purposes of the Act. On the other hand, the early cases implying amputation only, in addition to being overruled by Palazzolo, have been conclusory, citing no other authority and undertaking no analysis of the statutory language in context or the history of the language. Further, as discussed below, subsequent additions to the statute since the earliest cases have only added support to the validity of "loss of industrial use" as a "loss". The Palazzolo dissent obviously was not adopted by the majority and was ultimately abandoned by Justice Dethmers in Mitchell, when a unanimous court once again validated the "loss of industrial use" test in specific losses.

The Court of Appeals correctly noted in Cain v Waste Management, Inc., 465 Mich 509 (2002), this Court did not overrule Pipe. However, both Defendant-Appellant Second Injury Fund and Waste Management attempt to solve the problems created by this Court's decision by urging this Court to overrule 87 years of case law, adopt the approach which is *not* most universally applied in the country, which is *not* supported by the actions

of the legislature, and which is not consistent with the "plain meaning" of the terms used in the statute as defined by standard interpretive aids such as Merriam Webster's dictionary and Black's Law Dictionary (which bases its definition on an overview of case law throughout the country, both in disability law and the comparable area of insurance law). It is wrong for either Defendant to argue or assume that the "plain meaning" of loss is amputation (or its equivalent). The Court of Appeals correctly upheld the WCAC's award of benefits using the "loss of industrial use" standard. Therefore, this Court should deny Defendant's appeal and decline any invitation to overrule Pipe.

E The Legislative History of MCL 418.361(2) Shows the Legislature Does Not Restrict Specific Loss Benefits to Cases of Amputation or Physical Loss Only and Includes Loss of Industrial Use.

Further, in 1954 and 1956 the legislature amended the scheduled loss provisions of MCL §418.361(2) and MCL §418.361(3). PA 1954, No. 175, section 10; PA 1956, No. 195. The legislature is presumed to know how the courts have interpreted the terms of a statute and if the legislature allows the terms to remain during revisions of the statute, the legislature is presumed to approve and adopt the courts' interpretations. Dean v Chrysler Corp, 434 Mich 655, 664-667 (1990). However, the legislature did not amend the term "loss" in subsection (2) to exclude either destruction less than amputation or loss of industrial use.

Thus, the legislative and judicial history of the provision further support the WCAC's award of benefits. The courts and legislature have allowed claims for specific loss in cases of physical injury less than amputation from almost the beginning of the Act. Second, the phrase "loss of industrial use" (including the companion phrase "loss of primary service") has been used to evaluate such claims for decades, with the blessing

of the courts and legislature. It is wrong for either Defendant-Appellant Second Injury Fund or Waste Management to say that specific losses do not include "loss of industrial use." To the contrary, the phrase grew from infancy to adulthood in just such cases.

Both Defendant-Appellant Second Injury Fund and Waste Management argue that the phrase "loss of industrial use" began in T&P provisions and has been improperly read into specific loss provisions. They are both wrong. Instead, as described above, the phrase began in specific loss cases. It then spread to T&P cases. During the 1956 amendments the legislature saw no need to fix what was not broken in the specific loss subsection, i.e., the legislature approved the court's interpretation of "loss" to include "loss of industrial use" as that phrase had been developed by the courts in specific loss cases under MCL § 418.361(2). The legislature liked the phrase so much it codified the phrase, adding it to the redrafted T&P provisions of 1956. PA 1956, No. 195. Therefore, this Court should reject any arguments by Defendants that "loss of industrial use" improperly found its way into specific loss claims.

F The Remand By This Court Would Be Moot If the Standard Were For Amputation Only.

This Court remanded Cain's claim to the WCAC for determination of whether Cain had sustained the specific loss of his remaining leg. If a claim for specific loss benefits required amputation there would be no need for this Court to remand because the only issue would be whether Cain had any legs left, and all the parties agree that Cain has one leg remaining. The legal issue of "amputation" versus "loss of industrial use" in claims for specific losses was previously before this Court. Defendant-Appellant Waste Management previously presented this argument in the Brief on Appeal it submitted to the Michigan Supreme Court on July 2, 2001. This Court declined the invitation to

overrule over 80 years of legislative and judicial history by overturning Pipe and should do the same again.

Further, as Defendant-Appellant Second Injury Fund noted in its prior briefing to this Court, the affirmation by this Court in Cain that injured body members should be evaluated without mitigating devices would be nonsensical in specific loss cases if the standard was for amputation only. There would be no body part on which to attach a device. There would be no body part to evaluate in either a corrected or uncorrected condition. The whole test would be meaningless if this Court accepts this argument.

Therefore, this Court should once again reject the argument. The Court of Appeals properly held the WCAC used the correct test for specific losses, i.e. whether Cain had lost the industrial use of his remaining leg when evaluated in its uncorrected condition.

G This Court's Prior Decision and Second Injury Fund's Arguments Lead To Illogical and Absurd Results.

Because this Court denied Cain benefits under MCL § 418.361(3)(g), for loss of industrial use of two legs, both Defendants Second Injury Fund and Waste Management cry foul that the WCAC awarded Cain T & P benefits, presumably under MCL § 418.361(3)(b), implying that Cain improperly received benefits in conflict with this Court's earlier decision. Cain argues the real mischief in his case is not that he ended up with benefits under one subsection of the statute and not another, but that both Defendants are urging unsupported interpretations of the statutory term "loss" that require overturning precedent, legislative history and standard interpretive definitions, that create internal inconsistencies, and via the back door, reverse essential provisions of the Act such as the presumption of wage loss in scheduled losses and the distinction between scheduled

losses and general disability benefits (these last issues are discussed more fully in Section III, below).

1. This Court's prior decision in Cain results in the term "loss" meaning very different things in the same section of the Act.

This Court's prior decision means that the term "loss" in the statute means very different things depending on which subsection it is in. According to this Court, in the single loss provisions of MCL § 418.361(2) it means *without* corrective devices and *without* regard to wage earning capacity, as it does in the T & P provisions of MCL § 418.361(3)(b)-(f), but *with* corrective devices and *with* regard to wage earning capacity in MCL § 418.361(3)(g), and *with* corrective devices and *without* regard to wage earning capacity in MCL § 418.361(3)(a). This is not sound statutory construction.

2. Allowing only amputations to count as losses forces unconscionable choices on injured claimants.

Allowing benefits only where there has been an amputation and not where there has been loss of industrial use means that in the immediate shock and pain of a serious accident, claimants may be forced to choose amputation to ensure protection for themselves and their families versus attempting to reattach or rehabilitate damaged limbs. A claimant and his or her doctor could also face pressure from an insurer hoping to reattach a severed limb in the hopes of saving money in the long term. Cain faced a similar decision whether to save his own remaining leg. It would be naive to deny after 12 years of protracted litigation that he may have made a different decision had he known the approach taken by his employer and its insurer and the state agency designed to protect him in the event of a second injury.

3. Second Injury Fund's statutory interpretation results in absurd distinctions.

Second Injury Fund argues no absurd results occur as a result of its interpretations of the Act. This is not true. One needs look no further than Cain's own case to see absurd results. This Court held that Cain has the industrial use of his legs, even though he only has one leg.

Further, Second Injury Fund's proposed interpretation of the T & P provisions, which follow from its argument that only amputations count as "losses", unravels upon closer glance. MCL 418.361(3) provides:

> "Total and permanent disability, compensation for which is provided in section 351 means:
>
> (a) Total and permanent loss of sight of both eyes.
> (b) Loss of both legs or both feet at or above the ankle.
> (c) Loss of both arms or both hands at or above the wrist.
> (d) Loss of any 2 of the members or faculties in subdivisions (a), (b), or (c).
> (e) Permanent and complete paralysis of both legs or both arms or of 1 leg and 1 arm.
> (f) Incurable insanity or imbecility.
> (g) Permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm; for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury."

To begin, subsection (3)(a) grants T & P benefits for "total and permanent loss of sight of both eyes". According to the Second Injury Fund, the words "total and permanent" designate those categories of T & P covering losses other than amputation/physical loss. This then means a claimant who has lost both of his or her eyes cannot claim under this section for loss of sight.

Second Injury Fund's analysis also assumes that the various subsections of T & P benefits are mutually exclusive, i.e. injuries that qualify under one category must be

different than injuries that satisfy another category. This does not work, either. "Permanent and complete paralysis" of two limbs under subsection (3)(e) should satisfy loss of industrial use under subsection (3)(g), as should the loss of faculties of 2 legs under (3)(d), just as loss of two eyes under subsection (3)(d) should qualify as a loss of sight under subsection (3)(a).

Further, if "loss" by amputation and "loss " by industrial use are not considered equivalent losses under the statute, a claimant could bring multiple claims for total and permanent disability benefits for the same limbs, the first time for loss of industrial use, and again later if the limbs were subsequently amputated. The WCAC denied such a claim in Newton v Hoskins Manufacturing Co., 1992 ACO #738, only by noting that the two types of losses were equivalent under the statute. (Copy attached in Plaintiff's Appendix to Brief in Opposition to Appeal by Defendant-Appellant Waste Management).

A more rational explanation, then, of the absence of the words "total and permanent" from the subcategories (3)(b)-(d) is not that *only* amputation is permitted, but that "loss" had already been interpreted by the courts to include both physical loss and loss of industrial use in the specific loss provisions. Satisfied with the way the courts had interpreted the phrase, the Legislature left this phrase in the T & P provisions. Remember also that the specific loss provision and the T & P provision used to be the same provision. There is no basis to interpret the same word "loss" differently simply because it was later split off into separate subsections.

Second Injury Fund also ignores that subsection (3)(d) permits T & P benefits for "loss of any 2 of the members *or faculties*" listed in subsections (3)(a) - (c) (emphasis added). "Faculties" is not limited in this section to eyes/sight. This provides an additional

statutory basis for Cain's award of T & P benefits, since he has physically lost one leg and the faculties of the other. Thus the Legislature has shown no hesitation to permit T & P benefits for a mixture of physical losses and loss of faculties/loss of industrial use. Second Injury Fund's attempts to create impermeable categories in the T & P provisions is both at odds with how the provision operates and with common sense.

Second Injury Fund cites Paulson v Muskegon Heights Tile Co., 371 Mich 312 (1963), which states that the amputation of both legs or both feet satisfies the provisions of subsection (3)(b), and argues this is a limitation of the interpretation of this subsection. Instead, the court listed these losses as an example, not a limitation.

Finally, in the absence of statutory support there is no rational reason to interpret a provision that permits T & P benefits for two qualifying amputations or two qualifying losses of industrial use to bar recovery for a claimant who has one of each. The word "loss" is inclusive of each meaning.

H Cain's Interpretation of the Act is Logical, Consistent, Supported by Caselaw and History, and Was the Law at the Time of His Original Application for Benefits.

Defendant Second Injury Fund has yet to point out any inconsistencies that result from Cain's interpretation of the Act, the interpretation being used at the time of filing his claim. Simply put, the previous, workable, and consistent prior interpretation of the Act was that a.) single loss claims include claims for loss of industrial use, b.) external aids and devices are not considered in single loss claims or T & P claims because wage earning capacity considerations are irrelevant in either subcategory of scheduled losses, and c.) T & P claims for the loss of two members (for example, under MCL § 418.361(3)(b) or (g)) can include a combination of amputation, paralysis, or loss of

industrial use claims. The only harm Second Injury Fund can point to is that Cain, at long last, would finally collect the benefits to which he is entitled and which he has fought so long to obtain and that the Second Injury Fund would lose the opportunity to deny claims that have been permitted for almost 90 years. That is the true "plain meaning" of either Defendants' argument. This Court should restore the legal standards in place at the time Cain filed his claim. Defendant-Appellant Second Injury Fund's appeal should be denied.

II THE COURT OF APPEALS CORRECTLY UPHELD THE AWARD OF BENEFITS ON REMAND TO CAIN BY THE WCAC, WHICH HELD THAT CAIN WAS ENTITLED TO T&P BENEFITS BECAUSE HE HAD SUSTAINED THE LOSS OF EACH OF HIS LEGS.

Defendant-Appellant Second Injury Fund argues the WCAC erred when it awarded Cain T & P benefits and the Court of Appeals erred by affirming. Defendant-Appellant Second Injury Fund's arguments focus on two points. First, it argues the WCAC exceeded its authority on remand by awarding any benefits other than specific loss benefits, i.e. T & P benefits. Second, it argues that Cain never properly asked for T & P benefits.

A. The WCAC Is Allowed To Make Determinations of Law, and By Statute Cain Is Entitled to T & P Benefits Because He Has Sustained the Loss of Each Of His Legs.

The magistrate originally found two bases under which Cain would be eligible for T & P; that he had sustained the specific loss of each of his legs, and that he had lost the industrial use of both of his legs. The first would qualify Cain for T & P benefits under MCL § 418.361(3)(b) or (d), the second would qualify under MCL § 418.361(3)(g). This Court's decision denied Cain benefits under the second scenario and ruled the WCAC

had to consider the claim necessary to the first scenario, i.e., that Cain had sustained the loss of his left leg. (All the parties agree Cain had lost the right leg by amputation.) It is important to note this Court did not restrict remand to the specific question "Is Cain eligible for specific loss benefits." Instead, it remanded on the question of whether Cain had proved a claim for specific loss of his leg. This Court did not speak on the issue of who would state the legal conclusions of this determination.

This Court didn't need to speak on this issue because the legislature already has. MCL § 418.861a, subsections (11) and (14), permit the WCAC to make conclusions of law. Once the WCAC determined on remand that Cain had sustained the loss of his remaining leg, two legal conclusions followed inevitably from that determination. First, the WCAC awarded specific loss benefits because the benefits are the legal conclusion of the determination that Cain sustained the loss of his left leg.

Second, because Cain has sustained the loss of both of his legs, the WCAC correctly held that he is entitled to T & P benefits under the terms of MCL §418.361 and MCL §418.521(1). MCL §418.521(1), the "sequential loss" provision, provides:

> "If an employee has a permanent disability in the form of the ***loss of a hand, arm, foot, leg or eye*** and subsequently has an injury arising out of and in the course of his employment which results in another permanent disability in the form of the ***loss of a hand, arm, foot, leg or eye***, at the conclusion of payments made for the second permanent disability he shall be conclusively presumed to be totally and permanently disabled and paid compensation for total and permanent disability after subtracting the number of weeks of compensation received by the employee for both such losses. The payment of compensation under this section shall be made by the second injury fund, and shall begin at the conclusion of the payments for the second disability."[2] (emphasis added).

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[2] Under both Defendants' argument, i.e. that "loss" does not mean "loss of industrial use", no claimant could collect T & P benefits for sequential losses of industrial use because this section does not separately list "loss of industrial use" as a qualifying sequential loss. This is

The conclusion by the WCAC that Cain is entitled to T&P benefits did not require any additional factfinding by the WCAC or any separate analysis of whether Cain is totally and permanently disabled, it is simply the legal and logical conclusion of the WCAC's decision. It really is as simple as adding one plus one to get the two qualifying losses. Once Cain had two qualifying losses he was entitled to total and permanent disability benefits because that is how the statute is written and because he asked for T & P benefits in his original application for benefits. The Court of Appeals agreed there is no valid reason to restrict the WCAC to stating only one of the two legal consequences of its decision.

B. Cain's Original Application Requested T & P Benefits.

Defendant-Appellant Second Injury Fund's next argument must also fail. Cain's original application for benefits requested T & P benefits. The Second Injury Fund now tries to argue that Cain's original application sought benefits only under the specific subsection of the statute granting benefits for loss of industrial use of both legs, MCL §418.361(3)(g). However, the application did not state any specific statutory sections under which Cain sought the benefits.

Although the Second Injury Fund also tries to argue that Cain should have specified under which subsection of MCL § 418.361(3) he sought benefits, this Court rejected any argument that Cain should have explicitly pled the subsection of the statute under which he was claiming benefits. Sure, he could have been more specific, said this Court. But this Court also held there was enough information in Cain's application for

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another statutory conflict and absurd result of Defendants' arguments.

benefits for the magistrate to consider a claim for the loss of each leg in addition to a claim for the loss of industrial use of both legs. Both claims would result in an award of T & P benefits. Therefore it is wrong for Defendant-Appellant Second Injury Fund to state Cain only sought benefits under one subsection, and Defendant-Appellant Second Injury Fund's attempt to avoid the holding of Modreski v General Motors Corp., 417 Mich 323 (1983) on this basis must also fail.

Ironically, after Defendant Waste Management argued throughout the first phase of this lengthy case that it was only expecting a claim for T & P benefits and not any included claims for specific losses, Defendant Second Injury Fund tries to argue the opposite, that it was "very surprised" by any decision by the WCAC on remand awarding T & P benefits. Cain reminds this Court and all defendants that he only has one leg. Regardless of whether his claim is styled as a claim for two single legs or a pair of legs, there is only one leg to talk about, and all the evidence submitted at trial reflected this reality.

Thus, it is patently ridiculous for the Second Injury Fund (Total and Permanent Disability Provisions) to argue surprise. As noted by this Court in Hakala v Burroughs (After Remand), 417 Mich359 (1983), the *Second* Injury Fund is there for claimants who have one qualifying injury and then suffer a *second* injury, which then makes them eligible tor T & P benefits. A portion of these T & P benefits are payable by the Second Injury Fund (T & P Provisions). For the Second Injury Fund (T & P Provisions) to argue that when the WCAC considered whether Cain had a *second* injury and awarded T & P benefits because he had, that the Fund was completely surprised is without credence. Second injuries are their job. It is even their name. Cain asked for T & P benefits in his

original application, the potential for T & P liability was there from the start. The Second Injury Fund never asked to be dismissed from the case on remand and the WCAC invited the Second Injury Fund to submit a brief. Therefore, this Court should deny Defendant-Appellant Second Injury Fund's appeal on this issue.

III WAGE EARNING CAPACITY SHALL NOT BE CONSIDERED WHEN DETERMINING ELIGIBILITY FOR SCHEDULED LOSS BENEFITS.

A The Legislature Prohibited Consideration of Wage Earning Capacity Under the Scheduled Loss Provisions of MCL § 418.361(2) and (3).

MCL § 418.361(2) contains the presumption that workers who suffer the enumerated losses are disabled for the number of weeks specified in the statute. Consequently the amount of actual wages earned during the statutory period of disability for specific loss are *irrelevant*. Liesinger v Owen-Ames-Kimball Co., 377 Mich 159, 165, fn. 6 (1966). In other words, a worker with a specific loss shall receive the full benefits listed in the statute even though the worker may not have had *any* loss of wage earning capacity and may continue to work and even earn *more* than before the injury. Defendant Second Injury Fund acknowledges this in its brief, including citations that scheduled loss benefits are for non-vocational losses.

1. 1954 amendments to the Act limited the question of eligibility for T & P benefits to whether claimants met one of the listed categories and not whether the claimant was totally and permanently disabled as a matter of fact.

Prior to the 1954 Amendments of PA 1954, No 175, Section 10, the T & P provisions, now MCL § 418.361(3), read:

> "The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or of any 2 thereof, shall constitute total and permanent disability, to be compensated according to the provisions of section 9."

This Court explained in Clark v Chrysler Corp., 377 Mich 140, 144-146 (1966), that prior to the amendments not only did it interpret "loss" to include loss of industrial use, but it also interpreted this language to include other injuries which could be found as a matter of fact to be total and permanent disabilities, i.e., the statutory language was non-exclusive and any other injury causing total and permanent disability as a matter of fact could be considered.

However, the 1954 amendments changed the provision so that it set forth 6 specific categories of total and permanent disabilities. This Court interpreted this change to exclude any other category of total and permanent disability other than the listed provisions. Clark, at 145-146; Verberg v Simplicity Pattern Co., 357 Mich 636, 641-642 (1959). One consequence was that, "[b]y legislative enactment, which is controlling here, *the question of total and permanent disability is not one of fact but whether plaintiff's injuries come within one of the enumerated losses set forth in the statute.*" Hier v Boichot Concrete Products Corporation, 379 Mich 605, 612 (1967)(emphasis added).

2. The Legislature next prohibited the courts' practice of considering wage earning capacity for claimants seeking or collecting T & P benefits.

The Legislature also added the *conclusive* presumption that a claimant was totally and permanently disabled for the number of weeks listed in the T & P provision. PA 1955, No. 250. This Court explained in Liesinger, 377 Mich 158, 165, fn. 6 (1966), that the effect was that a claimant would now be found to be totally and permanently disabled "*without regard to current wage earning capacity*, to those injured employees suffering

specific losses ....".[3] (emphasis added).

3. The Legislature then codified the court's practice of including "loss of industrial use" in losses eligible for T & P benefits.

However, in 1956 the Legislature added a seventh category, loss of industrial use of two specified members to the total and permanent disability schedule of benefits in MCL §418.361(3). PA 1956, No. 195. As Dean requires, this also means that interpretations the courts gave the phrase "loss of industrial use" were also imported into the T&P provisions. See, Dean, 434 Mich at 664-667(1990). As this Court noted in Miller v Sullivan Milk Products, Inc., 385 Mich 659, 665 (1971) (emphasis added):

> "PA 1956, No 195, restored "loss of industrial use" as a measure of total and permanent disability by adding to the above six classifications the following: "(7) Permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm; ****." Since this court had decided a number of cases in which the term "loss of industrial use" was used, even though not appearing in the Workmen's Compensation Act, we conclude that the legislature intended to restore this Court's decisions defining the "loss of industrial use" test to the workmen's compensation law by Act 195."

Thus, at the time of the 1954 and 1956 amendments, the legislature was presumed to know of Lentz v Mumy Well Service, 340 Mich 1 (1954), in which this Court upheld benefits for the loss of industrial use of the hand. The Court reviewed the evidence and found support for the worker's compensation commission's factual findings that without the use of the prosthetic device which the claimant wore, "which served to protect what remained of his hand and to improve the use of it by allowing him to grasp

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[3] From 1927 to the effective date of this amendment, the employer had been entitled to offsets for any wages a totally and permanently disabled employee earned. See, Hebert v Ford Motor Co., 285 Mich 607 (1938). Accordingly, following the amendment, such offsets were not permitted because they violated the conclusive presumption of disability in T & P claims. Louagie v Merritt, Chapman & Scott, 482 Mich 274 (1969).

light objects between the thumb and the device", the claimant had lost the ordinary industrial use of the hand. Id. at 3-5. In other words, this Court did not consider prosthetic devices when evaluating a loss of industrial use claim.

Thus, when the legislature added loss of industrial use to the specifically enumerated eligibility provisions of the T&P section, the legislature must be taken to have specifically approved this Court's interpretation from Lentz which excluded prosthetic devices from the loss of industrial use analysis. Lentz arose in a specific loss claim for industrial use and by legislative incorporation applies to T&P claims for loss of industrial use. Therefore, prosthetics should not be considered in any loss of industrial use claims, much less in a specific loss claim. This Court reaffirmed in Cain, supra, that specific losses are not evaluated using corrective devices.

Therefore, the idea that scheduled loss benefits can only be awarded upon a showing of impairment of wage earning capacity is wrong. The benefits are awarded without regard to the wage earning capacity of the claimant. The legislative changes in 1954, 1955, and 1956 ended any argument that wage earning capacity is relevant to an analysis under either MCL § 418.361(2) or (3) and affirmed that loss of industrial use claims could be made under either provision. This Court reaffirmed in Kidd v General Motors Corp., 414 Mich 578, 586, 588 (1982), that unlike general disability cases, the earning of post-injury wages may not be considered in scheduled loss cases, including T & P cases.

B This Court's Prior Holding in This Case Violates The Statutory Presumptions of Disability in Scheduled Losses.

This line of cases and legislative development illustrates the plain error of this Court's prior holding in this case. This Court held that wage earning capacity was

relevant in T & P cases for loss of industrial use of two members. This Court apparently ignored the authority just cited, because it did not discuss the statutory presumption or these cases, nor overrule them. This Court should correct this obvious error in its prior decision.

This Court's error included the conclusion that external aids and devices should be considered in T & P claims for loss of industrial use. The rationale for doing so, as set forth in this Court's prior opinion, is that external aids and devices are relevant to whether there is any wage earning capacity, and wage earning capacity is relevant in loss of industrial use claims.

Tragically this would push the T & P analysis back to the days prior to the 1954 and 1956 amendments when wage earning capacity was relevant to scheduled loss claims and the analysis was one of fact and not of meeting the statutory definition. This Court's error also eliminates the distinction between T & P benefits and general disability benefits (MCL § 418.351(1)). Under general disability benefits, the analysis of disability *is* one of fact and not presumption and considers any external aids or prosthetics the claimant may be using.

This Court should reject any attempt to circumvent the conclusive statutory presumption of disability set forth in MCL § 418.361(2) or (3) by permitting evidence of the claimant's wage earning capacity. Considering external aids and devices in the analysis does just that, and should not be permitted.

The role of the Second Injury Fund provides another illustration of how this Court's prior holding leads to unworkable results. The Legislature intended for the provisions of MCL § 418.361(2) and (3) to work together, rather than as isolated provisions standing

alone. Support comes from the very name and nature of the Second Injury Fund. As discussed above, the Second Injury Fund operates for the benefit of workers who have a first qualifying loss (or specific loss), and then suffer a second qualifying injury. Such claimants are then entitled to T & P benefits, which include the differential benefits paid by the Second Injury Fund. Any effort by the courts to create a legal and factual canyon between specific losses and T & P benefits ignores how the SIF is structured and intended to operate. How could a claimant accumulate two qualifying losses for T & P benefits if this court (erroneously) holds, in effect, that the whole cannot be the sum of its parts because the part are irreconcilably different and cannot be added together? This is the effect of what this Court has done by holding that specific losses and T & P losses have different standards and purposes. Accordingly, this Court should reverse its own error in its prior decision, which erroneously injected ideas of wage earning capacity into T & P claims for loss of industrial use, in direct conflict with legislative and judicial history and statutory language, and which created obstacles to the functioning of the Second Injury provisions and the protections they were intended to provide to claimants with multiple injuries.

RELIEF REQUESTED

For the reasons stated above, this Court should deny Defendant-Appellant Second Injury Fund's appeal, uphold the WCAC's award of T & P benefits to Cain, correct the erroneous holding in its prior opinion that wage earning capacity and corrective devices are relevant in T & P claims for the loss of industrial use of two members, and decline to overrule Pipe v Leese Tool & Die, 410 Mich 510 (1981).

Respectfully submitted,

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